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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 1 1 1996

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

REPLY COMMENTS

Cox Communications, Inc. ("Cox") and Comcast Cable Communications, Inc. ("Comcast"), by their attorneys, hereby submit these reply comments in response to the Commission's *Notice of Proposed Rulemaking* (the "*Notice*") in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

The Commission's interpretation and implementation of the open video systems ("OVS") sections of the Telecommunications Act of 1996 (the "1996 Act") in this proceeding should advance Congress' desire to remove artificial restrictions on the services a company can provide. Accordingly, any interpretation of the 1996 Act that would limit or restrict a cable operator's ownership or operation of OVS facilities should be rejected. Granting cable operators the authority to provide OVS on the same terms as LECs not only is permitted under the statute, it also will promote the pro-competitive policies Congress sought to advance. The same is true for provision of video programming by a cable operator on a LEC's OVS facility.

The argument that LECs should have nearly total discretion with regard to operation of OVS facilities, resulting in an OVS regime that is nothing more than deregulated cable service, also violates the intent of the statute and should be rejected. The streamlined regulation of OVS only is supposed to be available if the provider cedes editorial control over two-thirds of its channel capacity. If LECs are given the benefits of OVS without having to make this trade off, they will have a tremendous competitive advantage over cable operators.

Furthermore, LECs are dominant providers in the local exchange market and will be for the foreseeable future. As a result of this dominance, LEC participation in non-core businesses that rely on LEC telephone facilities must be subject to regulation sufficient to protect LEC telephone ratepayers and to preserve and advance the potential for facilities-based competition in the local exchange market. Accordingly, the Commission should adopt cost allocation rules expeditiously and impose restrictions on a LEC's ability to bundle or jointly market OVS with non-competitive local exchange service.

II. OPERATION OF OVS FACILITIES BY CABLE OPERATORS IS PERMITTED UNDER THE 1996 ACT AND CONSISTENT WITH THE PRO-COMPETITIVE POLICIES CONGRESS SOUGHT TO PROMOTE.

In the *Notice*, the Commission concluded that permitting cable operators to provide OVS could result in substantial public interest benefits.[1/] Notwithstanding the Commission's conclusion, a number of parties argue that cable operators should not be permitted to be

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1/ *Notice* at ¶ 64.

facilities-based providers of OVS.[2/] These arguments are flawed because they would result in artificial barriers to the services that can be provided by cable operators which have no legal or public policy support.

A. The Statute Can and Should Be Read to Permit Cable Operators to Operate OVS Facilities.

In the *Notice*, the Commission asked whether there was any significance to the fact that Section 653(a)(1) permits LECs to provide "cable service" on an OVS and cable operators and others to provide "video programming."[3/] A number of parties argue that the different terminology used to describe the services to be provided by LECs and cable operators is significant given the organization of the statute and that the legislative history does not specifically mention cable operators as potential providers of OVS. According to these parties, the relevant language simply authorizes cable operators and others to be programmers on a LEC's OVS.[4/]

As Cox and Comcast explained in their initial comments, Congress could not have meant this language to exclude cable operators from operating an OVS. Section 653(a)(1) specifically deals with the filing of "Certificates of Compliance."[5/] Certificates only are

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2/ National League of Cities, *et al.* Comments at 46-48; New Jersey Office of Cable Television ("New Jersey") Comments at 2-9; Alliance for Community Media, *et al.* Comments at 36-37.

3/ *Notice* at ¶ 64.

4/ National League of Cities Comments at 46-48; Alliance for Community Media Comments at 36-37.

5/ Cox Comments at 3-4; Comcast, Adelphia and InterMedia ("Comcast")

(continued...)

required for the entity that operates an OVS facility, and therefore Congress intended to give the Commission discretion to permit cable operators to be facilities-based providers of OVS.[6/]

Authorizing non-LECs to provide video programming on a LEC's OVS would not only have been out of place in a section on "Certificates of Compliance," but would also have been superfluous. Section 653(*b*) already prohibits OVS operators from selecting the programming to be provided on more than one-third of the system's channel capacity if there is demand for the remaining two-thirds. And it prohibits OVS operators from discriminating among video programming providers in making such capacity available. It is thus obvious from this section that program providers and packagers other than the LEC -- including cable operators -- are permitted to provide programming on a LEC's OVS system. The only point of Section 653(*a*), then, must be to authorize entities other than LECs to provide their own OVS systems as well.

B. The Commission's Goal Should Be to Establish Parity Between Cable Operators and LECs, Not to Give LECs a Permanent Competitive Advantage in the Video Marketplace.

Even if the statute were ambiguous with regard to whether the Commission could permit cable operators to provide OVS, Comcast and Cox demonstrated that granting cable

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5/ (...continued)
Comments at 4.

6/ There is no apparent disagreement that cable operators that also fit the definition of a local exchange carrier have an absolute right under the terms of the 1996 Act to convert their cable operations to OVS status and to obtain access to municipal rights of way on the same terms as LECs that provide OVS. The only real debate is about non-LEC cable operators' options with regard to OVS.

operators the flexibility to provide OVS would promote competition in the video market and that the Commission not only can but should interpret the statute to grant such flexibility.[7/]

A number of parties argue that the lighter regulatory burdens of OVS should be available only to telephone companies in order to "level the playing field" with incumbent cable operators.[8/] However, this argument erroneously assumes that the existing playing field is tipped in favor of incumbent cable operators. Prior to the 1996 Act, the only impediment that prevented telephone companies from providing cable service in their telephone service areas on the same terms as incumbent cable operators was a legal and not a business factor--the telco/cable cross-ownership prohibition.[9/] Because the cross-ownership prohibition was the only obstacle to LEC provision of cable service, Congress "leveled" the playing field by removing the legal barriers to entry that existed prior to the 1996 Act. Therefore, while Congress may have sought to promote LEC entry into the video market by establishing a variety of permissible methods for LECs to provide video service, there would be no reason to provide an option to LECs under the statute that was not available to cable operators.[10/]

Furthermore, if Congress, for reasons that are not at all apparent, had been attempting to tip the balance in favor of the LECs, establishing OVS as a LEC-only service

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7/ Cox Comments at 2-3; Comcast Comments at 3-4.

8/ New Jersey Comments at 5.

9/ 47 U.S.C. § 533(b).

10/ The position expressed by the telephone companies in this proceeding confirms this analysis. Presumably, the LECs would have the most to gain by limiting the flexibility of cable operators in the video market. Therefore, their position that cable operators can and should be permitted to provide OVS is quite significant. Bell Atlantic, *et al.* Comments at 29.

would be a roundabout way to achieve that goal. If Congress' only goal was to promote entry of LECs in the video market, it would have lightened the regulatory burdens on LECs for other forms of video programming delivery, not just for OVS. Congress did not take this approach, however. Moreover, given Congress' clear desire to promote facilities-based competition for all services and to remove artificial restrictions between service providers, it is reasonable to conclude that Congress had no intention of favoring LECs by making OVS a LEC-only service.

Concerns that the public will not be served if cable operators transition from the traditional cable model to the OVS model are entirely speculative. For example, New Jersey argues that cable operators have an unfair advantage over OVS providers because they already have recovered the start-up costs of their facilities and therefore will be able to attract programmers with lower rates.[11/] This argument ignores the fact that the cable industry is highly capital intensive and cable operators constantly must invest in new and upgraded facilities to provide a variety of new services--including traditional local exchange service, a new business in which cable operators will be trying to catch up to the LECs. Moreover, the prospect of cable operators offering low rates to programmers on an OVS facility seems to provide an excellent reason to permit cable operators to operate OVS facilities. Presumably, this explains why the New Jersey Ratepayer Advocate, the

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11/ New Jersey Comments at 7.

government organization charged with protecting consumers in New Jersey, supports the ability of cable operators to operate OVS facilities.[12/]

C. Provision of Programming on an OVS by a Cable Operator Promotes Competition.

In addition to providing OVS facilities, cable operators may decide that providing programming on an OVS operated by another company is an effective method of serving its customers and expanding service. For example, a telephone company OVS facility may enable a cable operator to expand its customer base outside its cable franchise area.

The LECs take the position that an OVS provider should have discretion to deny carriage to cable operators seeking to provide programming on an OVS. This discretion is necessary, they claim, because the participation by cable operators in OVS will greatly increase "the difficulty of creating and maintaining a coalition of enrolled programmers for the development of a competitive retail offering."[13/]

As Comcast and Cox explained in their initial comments, this position contravenes the 1996 Act because the nondiscrimination requirement with regard to carriage on an OVS is absolute; even if discrimination were reasonable, which it is not, it is not tolerated under the

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12/ New Jersey Ratepayer Advocate Comments at 5. New Jersey also argues that cable operators would provide a minimal level of services if they were permitted to be facilities-based providers of OVS and that, in turn, would enable potential competitors to provide a similarly low level of service. New Jersey Comments at 6-7. This argument is flawed because it totally ignores the public benefits that result when competition is introduced in a market. Rather than provide a minimal level of service, competition between competing providers of OVS facilities would spur both companies to offer new or additional services at rates designed to attract consumers.

13/ Bell Atlantic Comments at 15-16.

statute.[14/] Moreover, the assumption that a cable operator would seek carriage on a LEC OVS facility for anticompetitive reasons ignores the legitimate reasons that would motivate an operator to program over an OVS, such as reaching subscribers outside its franchise area. In addition, from a cost/benefit perspective, paying a potential competitor for unnecessary services would not appear to be a sound strategy for competing against that company. In short, the concerns raised by LECs are speculative and the Commission's rules should make clear that OVS providers have no ability whatsoever to discriminate with regard to who receives carriage on the facility.

II. THE COMMISSION MUST REJECT THE "HANDS OFF" APPROACH TO OVS ADVOCATED BY THE LECS.

In their comments, the LECs argue that they must be provided maximum flexibility with regard to provision of OVS if OVS is to succeed as Congress intended.[15/] The LECs' obvious goal is turn OVS into an unregulated form of cable service with superior access to municipal rights of way. This objective is evidenced by the proposed rules filed by Bell Atlantic, *et al.*, which, among other things: (1) define an open video system in a manner virtually identical to the current definition of a cable system; (2) expand all existing municipal telephone franchises to include OVS even though OVS is not a communications

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14/ Cox Comments at 4-5; Comcast Comments at 5.

15/ Bell Atlantic Comments at 6.

service; and (3) give LECs virtual free reign with regard to the allocation of channels on an OVS and the presentation of programming to subscribers.[16/]

The LECs "hands off" approach to OVS presumes incorrectly that Congress favored OVS over the three other models available to LECs for the provision of video programming and that it intended for OVS and cable to be virtually identical except for the regulatory burdens each bears. As stated by the National League of Cities:

> OVS must succeed or fail on its own merits as an alternative to the cable model that is distinctively different from that model, not as a replacement for the cable model.[17/]

The National Cable Television Association ("NCTA") demonstrated in its comments that Congress made a conscious trade-off of policy goals in establishing OVS. In return for ceding editorial control over two-thirds of its system capacity, the OVS provider is relieved of the Title VI franchise requirement.[18/] If there is no loss of editorial control, as the LECs would have it, the purpose of OVS is defeated. Therefore, the LECs' faulty interpretation of the 1996 Act should not guide the Commission. Rather, the determination of how to regulate OVS and distinguish it from traditional cable service should be guided by the larger policy goal of promoting facilities-based competition in all telephone and video markets. To achieve this goal, the Commission must establish guidelines for applying its Part 64 cost allocation rules and restrictions on bundling and joint marketing of OVS with local exchange service.

16/ Bell Atlantic Comments, Appendix at 1-5.

17/ National League of Cities Comments at 3.

18/ NCTA Comments at 4.

Cox and Comcast demonstrated in their initial comments that cost allocation remains one of the most significant issues when a LEC provides video and telephone service over integrated facilities.[19/] The Commission acknowledged in the *Notice* that its Part 64 rules will apply to separate OVS costs from telephone costs, but stated that a separate proceeding would be initiated to determine how these rules apply in the context of OVS.[20/] The comments demonstrate that this proceeding must be completed before the Commission can permit LECs to begin offering OVS.[21/] Failure to establish clear guidelines for applying Part 64 will lead to the same contentious proceedings that characterized video dialtone and, more importantly, will place telephone company ratepayers at risk.

The comments also demonstrate that the Commission went too far in implementing the statutory requirement to repeal its video dialtone rules. As explained by MCI, the Commission's decision to eliminate accounting and reporting requirements for video dialtone without imposing any continuing obligation on LECs to track and separate the costs associated with video dialtone facilities is an invitation for LEC abuse.[22/] There is no way

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19/ Cox Comments at 5-7; Comcast Comments at 7-8.

20/ *Notice* at ¶ 70.

21/ NCTA Comments at 21-22; Tele-Communications, Inc. Comments at 3.

22/ MCI Comments at 7-8. The Commission eliminated the accounting requirements contained in Responsible Accounting Officer Letter No. 25, 10 FCC Rcd 6008 (1995), and the reporting requirements adopted in *Reporting Requirements on Video Dialtone Costs and Jurisdictional Separations for Local Exchange Carriers Offering Video Dialtone Service*, DA 95-2036 and AAD No. 95-69 (1995). The purpose of these requirements was identify the dedicated and shared costs of facilities used for video and telephone services, a purpose that is equally important regardless of the form that video service takes.

the Commission can prevent cross-subsidy if it cannot determine what costs have been incurred.

To promote facilities-based competition for all services, the Commission also must place restrictions on the ability of a LEC to bundle or jointly market non-competitive local exchange services with OVS. While LECs may freely enter the video programming market, cable operators that seek to enter the telephone market only can do so if they reach an interconnection agreement with the incumbent LEC. Because a cable operator will not be able to offer a package of telephone and video services until the LEC complies with its interconnection obligations, the Commission should not permit LECs to bundle or jointly market OVS and local exchange service until these interconnection obligations are satisfied.[23/]

IV. CONCLUSION

OVS has the potential to be a valuable new service for consumers, but the Commission must be sure that its rules do not promote OVS at the expense of other equally valuable forms of video programming service, such as traditional cable service. Accordingly, the Commission must permit cable operators to provide OVS services on the same terms as LECs and the Commission should establish cost allocation procedures and joint marketing restrictions that reflect the LEC's continued dominance in the local exchange market.

23/ AT&T's position that LECs should be permitted to jointly market, but not bundle, OVS and local exchange service, AT&T Comments at 4, fails to recognize the substantial advantage a LEC would have over a cable operator if it were permitted to jointly market its services before a cable operator is able to provide telephone service. NCTA at 24-25.

Respectfully submitted,

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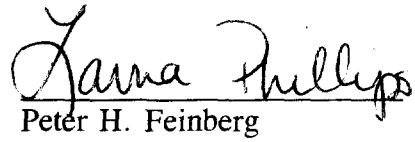

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CERTIFICATE OF SERVICE

I, Jeanette M. Corley, do hereby certify that on this 11th day of April, 1996, a copy of the foregoing "Reply Comments" was delivered by hand to the following parties:

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